Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 92-13
Tariff Filing Requirements for Interstate Common Carriers	)	
	)	

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

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SUMMARY

For many years now, it has been consistent Commission policy to rely upon the marketplace to the extent possible and to interpose regulation only where market forces, because of a lack of competition, are unable to prevent uneconomic behavior violative of the Communications Act. The Commission's decisions in Competitive Carrier, and specifically its adoption of "voluntary forbearance," are part of this overall approach to regulation. Non-dominant carriers subject to "voluntary forbearance" do not have market power which would enable them to engage in unlawful discrimination. Nor is it rational (even if possible) for them to take other actions which are violative of Title II. There can be no argument that it would be contrary to Commission policy, and make no economic sense for the Commission, after many years, to strike down "voluntary forbearance."

The only argument for such a course is that it is mandated by the language of Section 203(a): that the Commission has no regulatory flexibility and must require all common carriers subject to its jurisdiction to file tariffs. Although the Commission decided otherwise in Competitive Carrier, it is apparently AT&T's position that recent court decisions in MCI v. FCC and Maislin have undermined the Commission's position and that "voluntary forbearance" must be discontinued.

While the Court in MCI v. FCC took issue with many of the Commission's statements regarding deregulation in the

Competitive Carrier docket, it did not decide the issue of voluntary forbearance. The holding in that case is explicitly limited to a prohibition of mandatory detariffing--an issue which the NPRM does not address.

Maislin did not even involve the question of forbearance. Rather, Maislin was basically an affirmation by the Court of a well-established regulatory policy known as the "filed rate doctrine." The Commission's policy of forbearance does not involve, and is in no way at odds with, the "filed rate doctrine." The "filed rate doctrine" is, by its terms, limited to a situation in which there is a "filed rate" and where the common carrier charges a shipper or other customer a rate which is different from that "filed rate." Voluntary forbearance is something else. Voluntary forbearance involves a situation where an agency grants certain carriers--in this case non-dominant carriers--the right to forbear from filing tariffs at all. Where a carrier chooses under voluntary forbearance not to file tariffs at all, it is axiomatic that there can be no inconsistency with the "filed rate doctrine": because there is no "filed rate" there can, by definition, be no divergence between a "filed rate" and the rate the carrier is actually charging.

There is no question that MCI v. FCC and Maislin are relevant. However, there is also no question that both cases are distinguishable and far from dispositive on the issue of "voluntary forbearance." Moreover, these cases must be weighed against Congressional action in the TOCSIA legislation. The TOCSIA legislative history provides Congressional approval of both "voluntary forbearance" and the Commission's dichotomy between dominant and non-dominant carriers. TOCSIA also amends the Communications Act by adding an additional section--Section 226(h)(1)(A) and (B)--which can only be given meaning if Section 203(a) is read so as to give the Commission the flexibility to forbear from imposing tariff filing requirements upon non-dominant carriers. Thus, from a legal standpoint, Sprint believes that the Commission's position is at least as strong now as it was when "voluntary forbearance" was first adopted.

Similarly, from a policy standpoint, the soundness of "voluntary forbearance" is at least as apparent now as when first adopted. As the Notice points out, approximately 400 new carriers have entered the market and very few of these carriers file tariffs. For the Commission to restore the status quo ante and require all non-dominant carriers to file tariffs would create a mountain of paper with which the Commission's resources could not begin to deal. In any case, even if such resources could be found or made available, review of non-dominant carrier tariff filings would accomplish nothing positive. It would simply create economic inefficiency by interfering with the rates of carrier subject to competition and thereby impede competition itself in the intercity market.

Policy, precedent and the public interest all require that the Commission retain its long-standing position on "voluntary forbearance," unless the Commission determines such position is in no way legally supportable. For reasons explained below, such a conclusion is unwarranted. While there may be legal risks in continuing with "voluntary forbearance," assumption of such risks is inevitable in some cases if the Commission is to meet its obligations and the responsibility entrusted to it under the Communications Act to establish a proper regulatory framework for the telecommunications market.

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MAR 30 1992

Federal Communications Commission
Office of the Secretary

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Tariff Filing Requirements for	)	
Interstate Common Carriers	)	
	)	

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. ("Sprint") hereby respectfully submits its comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket (released January 28, 1992). The Commission's NPRM initiated a rulemaking proceeding "to review the lawfulness and future application of [the Commission's] forbearance rules and policy" and requests comment upon the Commission's authority under the Communications Act to forbear from requiring non-dominant carriers to file tariffs. This is indeed a pivotal question. As the NPRM makes clear, the Commission's forbearance policy is long-standing and "represents one of the cornerstones of the Commission's regulatory framework for the long distance industry."

Briefly, as shown below, the Commission adopted the policy of "voluntary forbearance" only after careful consideration and that policy is entirely consistent with the public interest. Legally, the Commission's decision on "voluntary forbearance" remains sound--and has perhaps grown stronger--as a result of recent developments. Economically, there is no reason for the Commission to require carriers without market power to file tariffs. In the absence of market power a common carrier cannot, or, at least cannot rationally, undertake conduct in violation of Title II of the Act. Insisting that such carriers file tariffs would lead to economic inefficiency and might harm interexchange competition. It also appears unlikely that at this point--given the spread of competition--the Commission's resources are sufficient to review all tariff filings of every common carrier subject to its jurisdiction. If anything, intervening events have made "voluntary forbearance" more essential, and less risky, than was true when this policy was first adopted.

I. BACKGROUND: THE GENESIS OF THE COMMISSION'S POLICY OF VOLUNTARY FORBEARANCE

The Commission opened the Competitive Carrier docket[1] in 1979 in response to the needs of a rapidly changing telecommunications industry. New carriers were entering the market to provide data services, specialized services, private line services and ordinary long distance services and to compete, for the first time, in what had largely been a monopoly preserve of AT&T and its Bell System carriers. Unlike AT&T and the traditional "independent" providers of local services--which dominated the market at the time the Communications Act was passed in 1934--these new carriers controlled no "bottleneck facilities" and had no market power.

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[1] CC Docket No. 79-252, In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, 77 FCC 2d 308 (1979).

Under well-established economic principles, given their lack of market power there was no real danger that new carriers entering the telecommunications market could charge excessive prices or collect "monopoly rents"; that they would have any real incentive to engage in unlawful discrimination or otherwise violate Sections 201 or 202 of the Act; or that they would be able to adopt predation as a realistic market strategy. Given these circumstances, it was apparent that continuation of a requirement that carriers without market power must continue to file tariffs would, as a policy matter, serve no real need. On the contrary, such a requirement might make matters considerably worse. Apart from the useless paperwork involved, insistence upon a policy that carriers must file tariffs whether or not they possessed market power would interfere with economic efficiency by distorting the workings of an emerging competitive marketplace, and these distortions might well impede the progress of competition itself.[2] In order to avoid these consequences, the Commission was understandably anxious to contract, and where possible, eliminate unnecessary tariff and other regulation of carriers without market power.

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[2] Although AT&T retains "market power," the newly emerging carriers have no such market power. From their standpoint, the telecommunications market is fully competitive. Regulating carriers subject to full competition would always be ill-advised because it would impose constraints which would be less effective, and less efficient, than those imposed by the marketplace itself.

Although the policy direction was clear, the Commission was presented at the outset with a serious legal question as to its authority under the Communications Act to accomplish its deregulatory goals. In particular, there was substantial doubt as to whether the Commission could, consistent with 203(a) of the Act, excuse carriers without market power from any obligation to file tariffs. Beginning with the adoption of a Further Notice (84 FCC 2d 445 (1981)), the Commission repeatedly considered the issue of detariffing particular groups of carriers without market power. Because of the seriousness of the concerns raised, the Commission moved cautiously and carefully. The Further Notice set forth at length the reasoning which underlies the Commission's decision to "forbear" from requiring carriers without market power to file tariffs.[3] In the series of decisions from 1981 to 1985 in Competitive Carrier[4] the Commission gradually extended forbearance to all common carriers without market power and drew a dichotomy between those carriers without market power

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[3]The Commission in its Further Notice also considered an alternative theory for permissive detariffing of common carrier services by carriers without market power. This alternative theory--the "definitional" approach--was apparently thought unsatisfactory and was not considered in later orders.

[4]Second Report and Order, 91 FCC 2d 59 (1982); Fourth Report and Order, 95 FCC 2d 554 (1983); and Fifth Report and Order, 98 FCC 2d 1191 (1984).

("non-dominant" carriers) and those carriers with market power ("dominant" carriers).[5]

Thereafter, in its Sixth Report and Order, 99 FCC 2d 1020 (1985), the Commission went further and required all non-dominant carriers to cease filing tariffs and remove those tariffs already on file. This last step proved to be too much. The decision was appealed by MCI to the D.C. Circuit, which reversed the Commission's decision forbidding non-dominant carriers from filing tariffs MCI v. FCC, 765 F.2d 1186 (1985). However, the Court specifically noted that "in so ruling" it did "not reach the question of whether the FCC's earlier permissive orders are invalid" MCI v. FCC, supra, at 1196. And, as the Commission states in its NPRM, in the seven years since the Court's decision in MCI v. FCC, voluntary forbearance has remained the rule, and most non-dominant carriers have relied upon this rule by choosing not to file tariffs.

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[5]The Commission continued to treat the domestic interstate interexchange services of Western Union and all record carriers subject to the Record Carrier Competition Act under streamlined regulation. The Commission's decision here was based upon the need "to facilitate compliance with the equal interconnection requirements" of that Act and the tariff filing requirements of the Commission's interim order implementing that Act (Fifth Report and Order, 98 FCC 2d at 1194). The Commission promised to consider forbearance "[i]f our tariff filing requirement for the domestic services of the international record carriers change" (id. at 1194, fn. 10). As of this date the Commission has not revisited the issue.

II. SUBSEQUENT EVENTS HAVE NOT UNDERMINED THE COMMISSION'S LONG-STANDING POLICY OF VOLUNTARY FORBEARANCE

The idea that a change in Commission policy may be necessary as a matter of law appears to be based upon two decisions issued subsequent to the Commission's adoption of its policy of voluntary forbearance for all carriers without market power--i.e., non-dominant carriers. The first case, MCI v. FCC, has already been referred to above. While the Court in MCI v. FCC took issue with many of the Commission's statements regarding deregulation in the Competitive Carrier docket, it did not, as mentioned, decide the issue of voluntary forbearance. The holding in that case is explicitly limited to a prohibition of mandatory detariffing--an issue which the NPRM does not address.

The second case cited as suggesting the impropriety of voluntary forbearance is the Supreme Court's opinion in Maislin Industries v. Primary Steel, Inc. (110 S.Ct. 2759 (1990)). Maislin, however, did not involve the question of forbearance. Rather, Maislin was basically an affirmation by the Court of a well-established regulatory policy known as the "filed rate doctrine." As the Court stated in Maislin (110 S.Ct. at 2762):

> This case requires us to determine the validity of a policy recently adopted by the ICC that relieves a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. We hold that this policy is inconsistent with the [Interstate Commerce] Act.

The Commission's policy of forbearance does not involve, and is in no way at odds with, the "filed rate doctrine." The "filed rate doctrine" is, by its terms, limited to a situation in which there is a "filed rate" and where the common carrier charges a shipper or other customer a rate which is different from that "filed rate." Voluntary forbearance is something else. Voluntary forbearance involves a situation where an agency grants certain carriers--in this case non-dominant carriers--the right to forbear from filing tariffs at all. Where a carrier chooses under voluntary forbearance not to file tariffs at all, it is axiomatic that there can be no inconsistency with the "filed rate doctrine": because there is no "filed rate" there can, by definition, be no divergence between a "filed rate" and the rate the carrier is actually charging. Thus, without a "filed rate" the comparison necessary for a violation of the "filed rate doctrine" simply does not exist.

Admittedly, this distinction was overlooked by the Commission in its decision terminating AT&T's complaint against MCI in File No. E-89-297, released January 28, 1992. But, in Sprint's view, the distinction remains critical. It is one thing to allow a non-dominant carrier the option of filing tariffs. It is quite another thing for a carrier to exercise this option and to file tariffs but then charge rates which are inconsistent with its tariffed rates. The second situation plainly involves a violation of the "filed rate doctrine." The first plainly does not. This distinction was emphasized by the Commission in the <u>Competitive Carrier</u> docket itself. In the <u>Sixth Report and Order</u>, the Commission allowed a transition period during which carriers declared non-dominant would be obligated to remove their tariffs currently on file with the FCC. The Commission made clear that to the extent tariffs remained on file during this period, the carriers whose rates were set forth in those tariffs "must provide...services consistent with the tariff until they chose to cancel those tariffs" (99 FCC 2d at 1034).[6]

A second point made by the Court in Maislin [7] is that tariffs are extremely important and that without tariffs enforcement of the reasonableness and discrimination requirements of the Interstate Commerce Act become difficult to the point of being impracticality. Specifically, the Court stated that without tariffs

> The ICC cannot review in advance the reasonableness of unfiled rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC.

110 S.Ct. at 2769 (emphasis in original). Here again, as was true of the "filed rate" doctrine, Sprint believes the Court's decision did not break new ground. Rather, the decision simply reaffirmed and emphasized long-established regulatory

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[6]As noted, this decision was reversed in other respects. However, there was no challenge to the Commission's argument that carriers were not free under Competitive Carrier to violate the "filed rate doctrine."

[7]Cited by AT&T as being at odds with the Commission's policy of voluntary forbearance, see, e.g., AT&T Petition for Writ of Mandamus to the D.C. Circuit, dated October 4, 1991, p. 11.

principles that were known to the Commission at the time of Competitive Carrier. For example, there has never been any dispute as to the general importance of tariffs. The Commission in a decision contemporaneous with Competitive Carrier--issued in 1980--emphasized that tariffs are "essential to the entire administrative scheme of the Act" since

> [t]hey serve as a kind of "tripwire" enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby ensure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act.

Western Union Telegraph Company, 75 FCC 2d 461, 474 (1980), reversed on other grounds, ITT World Communications v. FCC, 635 F.2d 32 (2nd Cir., 1980).

Competitive Carrier is not inconsistent with this view. The Commission's decision in Competitive Carrier is based on the assumption--soundly grounded in economic learning and basically unchallenged--that non-dominant carriers, because of their lack of market power, could not, or were at least highly unlikely to, engage in the kind of discrimination or unjust or unreasonable actions forbidden under Title II of the Communications Act. In essence, the Commission weighed the dangers of its loss of enforcement ability as a result of voluntary forbearance against the harm that would follow as a consequence of economic and competitive interference from a rule mandating that all non-dominant carriers file tariffs. The Commission, of course, did not relieve dominant carriers, whose market power would give them the ability to violate Title II, of the obligation to file tariffs and such obligation has been maintained to the present time. Maislin says nothing about the correctness of the balances drawn by the Commission in Competitive Carrier and does not determine the authority of the Commission under the Communications Act to undertake such a balancing under Section 203(a) in the first instance.

Third, Maislin has been cited as authority for the proposition that an agency cannot engage in deregulatory activities which are forbidden to it by its enabling statute.[8] In the specific circumstances before it, the Court stated that

> [A]though we agree that the Commission may have discretion to craft appropriate remedies for violations of the statute, see ICC v. American Trucking Assns., Inc. 467 U. S. 354, 364-65 (1984), the "remedy" articulated in the Negotiated Rates policy effectively renders nugatory the [the tariff filing requirements of the Interstate Commerce Act]...and conflicts directly with the core purpose of the Act.

110 S.Ct. 2769. There is obviously no basis for challenging the proposition that an agency cannot act in derogation of its statutory authority. But such proposition poses rather than answers the legal question at issue here. The question is precisely whether in establishing voluntary forbearance the Commission was acting within the statutory authority granted

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[8] See, AT&T Petition for Mandamus, supra, p. 18, n. 31; Motion of AT&T for Summary Decision, filed September 18, 1990 in File No. E-89-297, pp. 10-11.

to it by Congress. Maislin itself does not answer--and really does not even bear upon--the question of whether the Commission has exceeded the discretion entrusted to it under the Communications Act or whether its actions violate the "core purpose" of the Communications Act. Sprint believes that it is clear that voluntary forbearance is not only consistent with the "core purpose" of the Act, but that it is the only solution which is consistent with such "core purpose."

The fact that Congress did, in fact, intend to grant the Commission broad flexibility in enforcing Section 203(a) of the Act is, moreover, shown by the legislative history and passage of the Telephone Operator Consumer Services Improvement Act ("TOCSIA") of 1990 and the concomitant amendment of the Communications Act in accordance with this legislation. The TOCSIA legislative history demonstrates that Congress was well aware of the Commission's long-standing policy of voluntary forbearance for non-dominant carriers and the dichotomy that the Commission had drawn between non-dominant and dominant carriers for regulatory purposes.

Notwithstanding this knowledge, Congress' concern about the Commission's regulatory policies and voluntary forbearance was limited to the Commission's treatment of a particular class of non-dominant common carriers--Operator Service Providers ("OSPs"). There had been many complaints about the high rates charged by OSPs and Congress sought to remedy the problems that had arisen by imposing new obligations upon OSPs through legislation. This legislation required, inter alia, that OSPs submit so-called "informational tariffs" which could be filed on the first day that the "changed rates, terms and conditions" contained in the "informational tariffs" became effective (see Section 226(h)(1)(A)). In addition, the new legislation allowed the Commission to waive any requirements that the OSPs file "informational tariffs" after an initial period of four years following the date of the enactment of Section 226 (see 226(h)(1)(B)). In effect, the new legislation imposed tariffing requirements upon OSPs which overrode voluntary forbearance, but only for a particular class of common carriers for which a problem had arisen. As the Commission stated in its NPRM, the tariffing requirements imposed on the OSPs under TOCSIA are not as stringent as the tariffing obligations imposed under Section 203(a). Section 6 of the Report of the Senate Committee on Commerce Science and Administration (issued August 2, 1990) states that

> While the FCC is charged with the responsibility for determining how detailed these informational tariffs [filed by the OSPs] must be, the Committee does not expect that these informational tariffs would require the same amount of supporting documentation as required of most dominant carriers. For instance, the Committee does not expect that the OSPs will be required to comply with all the requirements of Part 61 of the FCC's rules.[9]

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[9] In the same Report, the Regulatory Impact Statement states that

> This legislation requires all operator services companies to file "informational

(Footnote Continued)

Both the Senate and a House Report issued by the Committee on Energy and Commerce[10] make it clear that, other than treating problems associated with OSPs, Congress intended to make no change in the Commission's policy of voluntary forbearance. The Reports state, in particular, that it was not the intention of Congress in the new legislation "to change the filing requirements for dominant interexchange carriers" (House Report, Section 5(a)).

Apart from the implicit approval of the Commission's forbearance policy and its treatment of non-dominant and dominant carriers, the TOCSIA legislation passed and contained in Section 226 provides strong support for a reading of Section 203(a) which is sufficiently flexible to allow the Commission to implement a policy of voluntary forbearance. Under well-established principles of statutory construction, an Act must be read as as integrated whole, but each section must also be read in, pari materia, so that each section is independently given meaning.

(Footnote Continued)
tariffs" with the FCC. The informational tariffs are necessary to allow the FCC to monitor the rates of OSPs and to determine whether competition in this market is benefiting the consumer. While this will increase the paperwork burdens faced by these companies and the FCC, these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers.

[10] Report 101-213, 101 Congress, First Session.

If one adopts the proposition--and Sprint obviously does not--that Section 203(a) is equally binding upon all carriers and that the Commission can make no exceptions for non-dominant carriers, including OSPs, Section 226(h)(1)(A) and (B) is rendered meaningless. The obligations contained in that section would have already been covered by the more stringent requirements of Section 203(a). Accordingly, after the passage of the TOCSIA legislation, sound statutory construction and the need to give meaning to Section 226(h)(1)(A) and (B) strongly suggest a reading of Section 203(a) which is sufficiently flexible to accommodate the Commission's policy of voluntary forbearance.[11]

III. THE COMMISSION'S POLICY OF VOLUNTARY FORBEARANCE IS LESS RISKY AND MORE NECESSARY NOW THAN WHEN FIRST ADOPTED

In its NPRM the Commission asks the parties to comment on whether it has the

> authority under sections 4(i) and 203 or other provisions of the Communications Act to continue to permit nondominant carriers not to file tariffs?

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[11]As a matter of abstract logic it could be argued that Section 226(h)(1)(A) and (B) could be given meaning if it were assumed that Congress was seeking to exempt OSPs from the requirements of Section 203(a) and impose lighter burdens on OSPs than any other dominant or non-dominant carriers. The difficulty with such argument is that it is belied by the legislative history of TOCSIA. Even a rudimentary view of that legislative history makes it clear that Congress was concerned with adding requirements for the regulation of OSPs to remedy the difficulties that had arisen in the provision of operator services.

As was true at the time the Commission began Competitive Carrier, there is no easy answer to this question. The legal proprietary of voluntary forbearance has never been entirely free of doubt. In initiating and working through its policy of voluntary forbearance in Competitive Carrier, the Commission was responding to a serious dilemma. It could adopt a narrow--and legally safe--reading of Section 203(a) and continue to apply the requirements of that Section to all common carriers regardless of whether or not such carriers retain, or ever had, market power, and regardless of the policy consequences such a course would entail. Alternatively, the Commission could adopt a more flexible approach--and a somewhat more daring one from a legal standpoint--which would allow it to remove regulation which was not only useless, but inconsistent with economic principles and harmful to competition.

Not surprisingly in Sprint's view, the Commission opted for the latter choice and took a broad reading of the flexibility allowed it in applying Section 203(a). It carefully evaluated the legal risks and was willing to assume those risks in order to carry out its obligation to regulate consistent with the public interest.

This dilemma has not disappeared. Nor have all legal doubts been stilled. Both MCI v. FCC and the Maislin case admittedly raise new questions, but, as shown above, they are hardly dispositive of the issue of voluntary forbearance. Quite the opposite, Sprint believes that given the TOCSIA legislation, the Congressional approval which it implies and the need under sound principles of statutory construction to give meaning to the new provisions added to the Act in Section 226, it is, on balance, easier to read Section 203(a) to permit voluntary forbearance than was the case when the Commission first examined the issue.

Likewise, the policy consequences of applying tariff regulation to all non-dominant carriers is at least as repugnant now as it was when the Commission decided to exempt these carriers in Competitive Carrier. Competition has continued to grow since the Commission adopted voluntary forbearance. As the Commission points out in the NPRM there are presently "in excess of four hundred non-dominant IXCs that offer common carrier services"; that "[f]ew, if any, of these carriers file tariffs for all of their service offerings"; and, that "most do not file any tariffs at all." Requiring all these carriers to file tariffs for both new and existing services[12] would create a huge and useless mountain

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[12]The Commission asks the carriers to comment in Question (c) of its discussion whether

> If the Commission's current forbearance rule is unlawful, should carriers be required to file any or all of their off-tariff service arrangements that are currently in effect? If so, in what time frame?

It would appear clear that if voluntary forbearance is found unlawful, common carriers must be required to file all of their current offerings in compliance with that Section. In other words, if the Commission has no right to exempt carriers or service offerings from the requirements of Section 203(a) in the first place it may not lawfully continue such exemption.

(Footnote Continued)

of paper at the Commission which existing Commission resources are inadequate to properly review and, perhaps, even to ensure that proper files are maintained for these tariffs.[13]

The Commission cannot lessen the impact of a decision on voluntary forbearance by limiting the carriers to which voluntary forbearance would apply. In Question (b) of the NPRM the Commission asks

> If the Commission's current forbearance rule is unlawful, does it necessarily follow that all common carriers must file tariffs? If not, for what classes of carriers is forbearance permissible and for what classes is it impermissible?

The answer to this question is suggested by the very failure of the Commission to propose "alternative classifications." Under voluntary forbearance, the Commission's consistent policy has been to excuse carriers from the requirements of Section 203(a) on the grounds that these carriers have no market power and therefore could not, or were at least unlikely to, engage in activities violative of Title II.

(Footnote Continued)
Therefore, all carriers subject to 203(a) must file tariffs for existing offerings immediately or, if this is impossible, within a reasonable time frame. A violation of the Act should not be permitted to continue longer than necessary.

[13] In Question (d) the Commission asks whether a determination that its current forbearance rule is unlawful would also require "other Commission rules to be changed." One major change may be the obligation to require that Section 214 applications again be filed by non-dominant carriers for all facility authorizations. These Section 214 applications would then have to be reviewed and an order granting or denying the application would then have to be issued. This will further strain Commission resources and result in useless and probably harmful regulation.

Thus, carriers which are non-dominant are unlikely to be able to sustain excessive prices, to discriminate against specific customers or to adopt a predatory strategy. This is true for all non-dominant carriers: large non-dominant carriers, small non-dominant carriers, resellers and carriers providing service in whole or in part over their own facilities.[14]

Thus far, Sprint is unaware of any suggestion that the challenge to the Commission's authority under Section 203(a) to exempt certain carriers from the requirements of that provision can be met by narrowing the classification of carriers exempted. Rather, the argument appears to be that the language of Section 203(a) must be read narrowly and that such a reading does not permit any exceptions from its requirements. For the Commission to adopt a legal rationale at this point which departs from the dichotomy established in adopting voluntary forbearance would be likely to increase, not decrease, any legal uncertainties which the Commission faces.

Moreover, there is an additional point which would seem highly relevant in solving any equation which balances legal safety against correct policy (viz., the need to regulate in a manner which is economic, which promotes competition and which

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[14]There may be special problems that arise from time to time for common carriers providing specific services such as occurred with the operator service providers. However, the basic distinction remains between dominant carriers (those which have market power) and non-dominant carriers (those which do not have market power).

is otherwise consistent with the public interest). Plainly, in determining such balance, it is important to remember that the issue here is not one of first impression. Voluntary forbearance has been Commission policy for more than a decade now. Carriers have entered the telecommunications industry based on such policy and have structured their offerings (either tariffed or non-tariffed) based upon such policy. For the Commission to reverse course, sua sponte, at this late time would be extraordinary and, in Sprint's view, could be justified only if the Commission were to find that there was no legal justification whatever for continuing voluntary forbearance.

For the reasons explained above, there plainly would be no basis for a finding that voluntary forbearance should be terminated. Rather, both the Commission's legal position and the policy need for voluntary forbearance are stronger than ever. Under the circumstances present here, the Commission must, at a minimum, continue its policy of voluntary forbearance--which as best Sprint can determine is opposed primarily or, perhaps, exclusively by AT&T[15]--and to defend

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[15] It is difficult to understand what kind of regulatory structure AT&T would have the Commission adopt. On the one hand, it would have the Commission expand regulation dramatically by requiring all common carriers--even the smallest reseller--to file tariffs. On the other hand, despite its continuing market power (as found by the Commission in its recent decision in CC Docket No. 90-132, Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991)) AT&T would have the Commission further attenuate the minimal regulation to which AT&T is presently

(Footnote Continued)